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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiffs,

vs.

David Allen Harbour,

Defendant.

CR-19-00898-PHX-DLR (DMF)

**UNITED STATE'S MOTION TO
STRIKE DEFENDANT'S
NOTICE OF SUPPLEMENTAL
AUTHORITY [DOC. 766]**

ARGUMENT

For the fourth time the United States moves this Court to strike one of Defendant's post-trial pleadings for failure to follow established Court Rules. On the eve of the forfeiture oral argument Defendant has filed a sur reply masquerading as supplemental authority. The motion should be stricken for a number of reasons. First, this filing does not alert the Court to new, arguably, intervening law. Instead, it cites seven cases, some out of circuit, issued years ago that were available to Defendant when he filed his response.¹

¹ Indeed, one of the cases (*United States v. Capoccia*, 503 F.3d. (2d. Cir. 2007)) was cited in the Government's reply. Simply put, Defendant provides this Court with "supplemental authority" that was already provided then misstates the proposition of the case. *Capoccia* involved substantive interstate transportation of stolen property counts rather than the lengthy scheme to defraud involving wire and mail fraud alleged in the Second Superseding indictment here. *Id.* at 117-118 ("Capoccia's conviction under Count

1 In short, none of the cases cited as supplemental authority were decided after the
2 close of the forfeiture briefings. Second, Defendant never sought leave of the Court to
3 supplement its filing and the Court never invited further briefing on forfeiture.

4 Third and importantly, the “supplemental authority” constitutes an additional,
5 unauthorized, 3-page sur response. It should be stricken for that reason alone. LRCiv
6 7.2(m)(1). See *E.E.O.C. v. Creative Networks, LLC and Res-Care, Inc.*, 2008 WL 5225807,
7 at *3 (D. Ariz. Dec. 15, 2008) (striking separate responses and replies to summary
8 judgment statements of fact that contained further factual and legal arguments in support
9 of the summary judgment motion). “Sur replies ... are highly disfavored, as they usually
10 are a strategic effort, as it is here, by the nonmoving party to have the last word on a
11 matter.” *In re Enron Corp.*, 465 F.Supp.2d 687,691 n. 4 (S.D.Tex.2006) (quoting *Lacher*
12 *v. West*, 147 F.Supp.2d 538, 539 (N.D.Tex.2001). Accordingly, courts will not allow sur
13 replies except “in the most extraordinary circumstances.” *Beckner v. Astrue*, 2007 WL
14 2013608 *1 (D.Kan.2007). See also *Gen.Elec. Co. v. Latin Am. Imports, S.A.*, 187 F. Supp
15 2d 749, 752 n. 1 (W.D.Ky.2001) (“[M]otions for sur replies ... will be summarily denied
16 absent extraordinary circumstances.”).

17 Defendant had a full and fair opportunity to brief forfeiture issues in this case prior
18 to the scheduled hearing. His untimely motion filed a day before the hearing, disguised as
19 supplemental (dated) authority should be stricken.

20 CONCLUSION

21 For the foregoing reasons, hereby request that the Court grant this motion and enter
22 an order striking the Defendant’s Supplemental Authority and give it no consideration.

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24
25 One is not for a scheme, conspiracy, or enterprise, because 18 U.S.C. § 2314 prohibits only
26 individual instances of transferring stolen money. Funds received from the pre-May 2000
27 uncharged transfers are not proceeds of, and thus do not have the “requisite nexus” to, the
28 post-May 2000 payments forming the basis of Capoccia's conviction.”)

1 Respectfully submitted this 26th day of July 2023.

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3 GARY M. RESTAINO
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5 s/Kevin M. Rapp
6 KEVIN M. RAPP
7 Assistant U.S. Attorney
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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2023, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants who have entered their appearance as counsel of record.

s/Daniel Parke
U.S. Attorney's Office